

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
Washington, D.C.

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In the Matter of:

BURNELL MOLIERE,

Respondent.  
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Docket No. 10-3628-DB

DEBARRING OFFICIAL'S DETERMINATION

INTRODUCTION

By Notice of Proposed Debarment dated January 26, 2010 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondent BURNELL MOLIERE that HUD was proposing his debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a period of three years from the date of the final determination of this action. The Notice further advised Respondent that his proposed debarment was in accordance with the procedures set forth in 2 CFR parts 180 and 2424. In addition, the Notice informed Respondent that his proposed debarment was based upon his conviction in the United States District Court for the Eastern District of Louisiana for violating 31 U.S.C. §5324 (Structuring).

A hearing on Respondent's proposed debarment was held in Washington, D.C. on April 24, 2010, before the Debarring Official's Designee, Mortimer F. Coward. Respondent was represented by Kenneth J. Saber, Esq. and Marvelle L. Butler, Esq. Patrisha L. Tijerina, Esq. and Geoffrey Patton, Esq. appeared on behalf of HUD. The record closed on May 28, 2010.

Summary

I have decided, pursuant to 2 CFR part 180, to debar Respondent from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government for a period of 18 months from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

1. The Notice of Proposed Debarment dated January 26, 2010.
2. A letter from Respondent's attorney dated February 23, 2010, addressed to the Docket Clerk requesting a hearing on Respondent's proposed debarment.

3. Respondent's Pre-Hearing Brief in Opposition to Government's Request for Three-Year Debarment filed April 21, 2010 (including all exhibits and attachments thereto).
4. Respondent's Post-Hearing Reply Brief in Opposition to Government's Request for Three-Year Debarment filed May 24, 2010.
5. The Government's Pre-Hearing Brief in Support of Three-Year Debarment filed March 29, 2010 (including all exhibits and attachments thereto).
6. The Government's Post-Hearing Brief in Support of Three-Year Debarment filed May 11, 2010.

### Government Counsel's Arguments

Government counsel states that at all relevant times Respondent was the president and Chief Executive Officer of A.M.E. Services Inc., a contractor that performed services for the Housing Authority of New Orleans (HANO). Respondent pleaded guilty and was convicted for his participation in a scheme involving structuring of financial transactions in violation of 31 U.S.C. §5324. Subsequently, Respondent was sentenced in November 2009 to three years' probation and ordered to pay a \$3,000.00 fine. In summary, and as further detailed in the Bill of Information and Factual Basis filed January 22 and January 24, 2008, respectively, in the criminal matter, Respondent, in January 2005, received from a friend and deposited in his personal checking account a "kickback" check for \$40,000.00 that was paid to the friend.<sup>1</sup> In an effort to evade the currency reporting requirements of 31 U.S.C. § 5313, Respondent wrote several checks to straw-payee cash checkers and to cash. None of the checks Respondent wrote exceeded the \$10,000.00 maximum that would have required Respondent's bank to file a currency transaction report. Respondent instructed the straw-payees to cash the checks and return the proceeds to him. Thereafter, in a series of installments, Respondent transferred the \$40,000.00 back to his friend.

Counsel argues that Respondent, as president and CEO<sup>2</sup> of A.M.E. Services, Inc., (AME) contracted to perform services for HANO, a recipient of HUD funds. As such, Respondent was involved as a participant in a covered transaction and is subject to the debarment regulations at 2 CFR part 180. Counsel adds further that Respondent's conviction provides cause for debarment under 2 CFR §180.800(a)(4) because structuring financial transactions is an offense that indicates a lack of business integrity or business honesty that directly affects a respondent's responsibility. Counsel continues that Respondent's participating in the structuring scheme demonstrates that he lacks the requisite responsibility to participate in federally funded programs and poses a risk to the

<sup>1</sup> As described by Respondent in his post-hearing brief at p. 2 "[i]n January 2005, a local businessman, Mr. Mose Jefferson (referenced throughout court documents as 'Mr. A'), wrote Ms. Simms [Respondent's friend] a gratuitous check for forty thousand dollars (\$40,000), which was connected to her promotion of the Orleans Parish School Board's expansion of the I Can Learn® program within the Orleans Parish school system. The check was drawn on Mr. Jefferson's corporate bank account, signed by him and dated January 7, 2005. Mr. Jefferson did not make the gratuitous payment directly to Ms. Simms. Instead, the check was made payable to a nominee payee." (footnotes omitted)

<sup>2</sup> The Government's pre-hearing brief states inadvertently that Respondent was the "chief financial officer ('CEO') [sic] of A.M.E. Services, Inc." It is undisputed, however, that Respondent was the CEO, as the parenthetical abbreviation and Government Exhibit 5 make clear. The Government's typographical error is of no moment and played no role in today's decision. Respondent's post-hearing brief indicates that he resigned as president and CEO of AME in March 2008.

federal government; thus, Respondent is not a person with whom the federal government or other participants in covered transactions should conduct business.

In arguing that a period of debarment should be imposed on Respondent for his misconduct, counsel contends that, as of the writing of the Government's brief, Respondent had not asserted any defenses or identified specific facts that contradicted the statements contained in the Notice. *See* 2 CFR § 180.825(a). Counsel considers the harm that resulted from Respondent's wrongdoing (one of the aggravating factors set forth in 2 CFR § 180.860) and concludes that Respondent's "actions assisted in fixing the method in which the OPSB approved the utilization of the Businessman's product, and consequently compromised the integrity of OPSB's procurement process." Counsel also views as an aggravating factor, Respondent's design and execution of the scheme to disguise and conceal "the illicit nature of the funds and evade federal reporting requirements." Counsel further adds as aggravating factors: the absence of evidence in the record of Respondent's remorse for his wrongdoing, of his offer to pay for the costs incurred by the government in investigating his misdeeds, of his bringing the offense to the attention of any government authority, or of his cooperation with any government agency during the criminal investigation.

Counsel concludes that Respondent's conviction demonstrates that he is not presently responsible, and that the public interest warrants Respondent's debarment for three years.

### Respondent's Arguments

Respondent, through counsel, argued at the hearing that his conviction did not involve an offense that indicates lack of business integrity. Respondent argues further that there is a difference between professional and personal business. Respondent's actions in the structuring scheme were not, counsel asserts, related to his business activities but were limited only to his personal affairs. Thus, the \$40,000.00 check that Respondent received from his friend was deposited ("despite his suspicions as to the transaction's legality") in Respondent's personal checking account, not in his business account. Respondent reiterates this point in his post-hearing brief, arguing that "his money structuring conviction, which included acts that did not involve his business, but were personal in nature under the particular circumstances of this case, is not the type of conviction which, pursuant to 2 C.F.R. § 180.800(a)(4), indicates a lack of business integrity and business honesty such that imposing debarment is warranted."<sup>3</sup>

Respondent's counsel argues further that Respondent's actions related to his structuring conviction were "motivated by friendship in connection with his poor choices," as noted by the prosecutor. Counsel also notes that Respondent received no pecuniary benefit from his misguided actions, is remorseful for his wrongdoing, and notes the laudatory comments by the prosecutor with respect to Respondent's cooperation in the

<sup>3</sup> Resp. Post-hearing Br. at 1. HUD takes issue with Respondent's position, arguing in its post-hearing brief at pp. 1-2 that "[e]ven though Respondent's conduct was outside the context of his dealings with HUD, HUD considers Respondent's actions to circumvent federal reporting requirements, and resulting criminal conviction, a cause for debarment because such actions demonstrate Respondent's disregard for the law and his willingness to violate federal requirements, which are an indication that Respondent lacks business integrity, business honesty, and present responsibility."

criminal investigation.<sup>4</sup> Respondent has “taken the necessary steps to mend the damage that his actions have caused,” and counsel also notes that Respondent no longer serves as president of A.M.E. Services, Inc.

In reviewing the mitigating factors at 2 CFR § 180.860, Respondent counsel points out that the kickback and structuring scheme did not compromise the Orleans Parish School Board (OPSB) procurement process. As it was, the recipient of the kickback was no longer on the school board when Respondent received the \$40,000.00 check that he cashed for her. Respondent has no history of wrongdoing; he did not plan the kickback scheme that gave rise to the single criminal act for which he was convicted; and, his misconduct was of short duration. As counsel noted before, Respondent accepts responsibility for his wrongdoing and recognizes the seriousness of his misconduct. Further, counsel adds that Respondent has paid his criminal fine and, as demonstrated in the excerpt of the sentencing transcript, attached as Ex. 2 of Respondent’s pre-hearing brief, Respondent cooperated fully with the investigating authorities and the prosecutor from the start of the investigation and throughout the entire process.

Respondent’s counsel also takes issue with Government counsel’s argument that Respondent acted as an agent of AME by virtue of, among other things, three contracts (see Gov’t Ex. 5) signed by Respondent as president and CEO of AME. The contracts were signed, Respondent’s counsel argues, after Respondent’s friend was no longer on the school board and after Respondent received the check from her. In any event, counsel argues, even if Respondent acted as an agent of AME, he acted outside the scope of his employment with AME. More pointedly, Counsel asserts that “the act of [Respondent’s] cashing the check, albeit wrong, was in no way connected to any government contracts concerning HANO, [Respondent] or AME.” Additionally, because the contracts were “not even in existence at the time the crimes were committed, [they] cannot be reasonably imputed as a nexus.” Thus, “HUD’s arguments and evidence do not support debarring” Respondent.<sup>5</sup>

In his post-hearing brief, Respondent argues that “[n]ot all convictions can be viewed as a basis for debarment. Otherwise the language of the regulations would be for naught.”<sup>6</sup> HUD, Respondent argues, “fails to realize that it bears the burden of establishing that Mr. Moliere’s structuring conviction, which did not involve his company, indicates a lack of business integrity and business honesty. Moreover, HUD ignores clearly established principles concerning statutory construction as it relates to the meaning of the words ‘business integrity’ and ‘business honesty’ as those words appear in the regulations.”<sup>7</sup> As Respondent sees it, the “word business, which is stated twice in

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<sup>4</sup> In his allocation at the sentencing hearing, the prosecutor praised Respondent for his “more than substantial” cooperation and assistance in this case, and for Respondent’s “more than complete, truthful, reliable testimony.” See Resp. Pre-hearing Brief Ex. 1 (Transcript of Sentencing Hearing).

<sup>5</sup> Resp. Br. at 12-13.

<sup>6</sup> Resp. Post-Hearing Br. at 7.

<sup>7</sup> Id. at 8. ( In its post-hearing brief at p.5, the Government argued that “Respondent cites no authority to support that professional business acts or conduct occurring strictly within the capacity of a businessman, contractor, and/or a person’s professional dealings are the only acts or conduct that indicate a lack of business integrity or business honesty.” HUD further argued that “there are many offenses that may indicate a lack of business integrity or business honesty [and] commission of any offense that is a sign, symptom, or index of of a lack of business integrity or business honesty may be a cause for debarment. Further, HUD’s

[2 CFR §180.800(a)(4)] the provision which HUD is relying upon as a basis for debarment . . . should not be construed so as to render the word superfluous, void, or insignificant. . . . HUD has not established, nor can it be established, that the plain meaning of the word business should not be given its ordinary and plain effect and meaning, which is a long-standing principle.”<sup>8</sup> Thus, Respondent contends that HUD has failed to meet its burden of proving that the structuring offense reflects on Respondent’s business integrity or business honesty, especially because the prosecutor at Respondent’s sentencing intoned that his conduct was motivated by friendship in connection with his poor choices.”<sup>9</sup>

In closing, Respondent argues that he possesses the requisite present responsibility to conduct business with the federal government, reiterating and elaborating on the mitigating factors discussed above. Additionally, Respondent contends that his actions since his commission of the criminal offense demonstrate that he is presently responsible to conduct business with the federal government. Respondent concludes that debarment is not warranted and a three-year period, if debarment is imposed, is not appropriate.

### Findings of Fact

1. Respondent was at all relevant times the president and CEO of AME, a contractor that performed services for HANO, a housing authority that received funding from HUD.
2. Respondent engaged in a structuring scheme in 2005 that had no relationship to or connection with his position as president and CEO of AME.
3. The \$40,000.00 check that Respondent received, which was used in the structuring scheme, was deposited in Respondent’s personal checking account.
4. Respondent engaged in the structuring scheme as a favor to his friend who received the remittance as a kickback from a businessman.
5. Respondent disbursed the entire \$40,000.00 deposit to his friend in increments of less than \$10,000.00, thereby not triggering the reporting requirements imposed on his bank pursuant to 31 U.S.C. § 5313.
6. Respondent was convicted of structuring in 2009 and was sentenced to three years’ probation and fined \$3,000.00.
7. Respondent, based on the prosecutor’s remarks at his sentencing, provided “much more than substantial” assistance in the investigation and prosecution of his offense and in related cases.
8. There is no evidence that Respondent has a history of prior wrongdoing.
9. Respondent resigned as president and CEO of AME in 2008.

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debarment regulations do not require that the cause for debarment be based upon conduct directly related to his or her business dealings with HUD.”)

<sup>8</sup> Id. at 9.

<sup>9</sup> Id. at 10.

## Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. As a former CEO and president of a company that performed services for a recipient that received HUD funding, Respondent is subject to the debarment regulations as a "person who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction." 2 CFR § 180.120(a).
2. Respondent's conviction for structuring provides cause for his debarment pursuant to 2 CFR § 180.800(a)(4).
3. The regulation at 2 CFR 180.800(a)(4) countenances debarment of a person who is convicted for the "[c]ommission of any other offense," i.e., other than the offenses enumerated in paragraphs (a)(1) through (a)(3). The "other offense," the regulation makes plain, is only actionable if it "indicat[es] a 'lack of business integrity or business honesty.'" The word "indicating" in the regulation is used in its usual acceptance of "to show or point out." See *Webster's II New College Dictionary* 6 (1995). Accordingly, all that is required to bring Respondent's conduct within the purview of the regulation is not that the conduct had to have taken place within a business environment or in a business transaction, but that his conduct lacked the standard of integrity or honesty usually associated with business dealings. The courts have held that debarment is a sanction which may be invoked by HUD as a measure of protecting the public by ensuring only those qualified as "responsible" are allowed to participate in HUD programs. *In re. Buckeye Terminix Co., Inc., citing Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980) and *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C. 1976).
4. There is nothing in the regulations that immunizes a person from a debarment action who engages in a personal transaction that results in a criminal conviction. To be sure, the person would have to be an individual, such as Respondent, covered under 2 CFR § 180.120, that is, a person who has been or may reasonably be expected to be a participant in a covered transaction. Cf. 2 CFR § 180.210, which provides that "all nonprocurement transactions, as defined in § 180.970, are covered transactions unless listed in the exceptions under
5. § 180.215." No exception or exemption has been found in the regulations or in the case law that would act as a prophylactic against the imposition of a debarment for personal misconduct such as that in which Respondent engaged.
6. Respondent is in error in his argument that HUD has construed the word "business" so as not "to adhere to the plain, 'ordinary, contemporary, common' meaning of the word," thus rendering the word "superfluous, void, or insignificant." As shown above, the word "business" as used in the regulation is critical in that it describes the standard, not the activity, to be applied in judging a respondent's conduct, and thus his present responsibility.

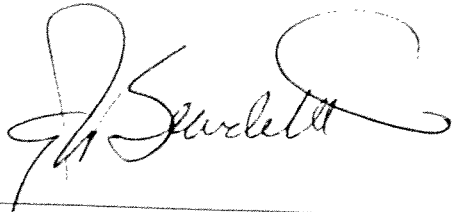
7. If the position pressed by Respondent were to be adopted, it would result in the incongruity of a respondent who has engaged in covered transactions and has been convicted of a crime resulting from a personal transaction being placed beyond the reach of the debarment regulations. On the other hand, however, a similarly situated respondent who is convicted of a like offense, but because of the happenstance that his act occurred in a traditional business transaction, would be subject to the debarment regulations. Such a restrictive view of the debarment regulations would not be in consonance with the regulation at 2 CFR § 180.125(a), which provides that "to protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons." Responsibility is not determined by the identity a respondent assumes when committing a criminal act, that is, whether the respondent was acting in his personal or business capacity. It is the act itself that determines whether a respondent's conduct offends the debarment regulations. Thus, it is well established that lack of present responsibility can be based upon past acts. *See In re Buckeye Terminix Co., Inc.*, HUDALJ 89-1402-DB (August 31, 1990), holding that "Responsibility encompasses the projected risk of a person doing business with HUD. This includes his integrity, honesty, and ability to perform. The primary test for debarment is present responsibility although a finding of present lack of responsibility can be based upon past acts." (Citations omitted) Those past acts being criminal in nature, as the case law makes plain, are not segregated according to whether they were committed in a business or personal capacity. It is instructive that *Buckeye* and the cases cited therein do not limit their description of the requisite "integrity" and "honesty" to business integrity and business honesty, as urged by Respondent. This clearly shows that, in the context in which these cases arise, "integrity" and "honesty" are treated as constants, not as variables that change according to the description of the transaction at issue, i.e., business or personal.
8. Respondent is also in error in assuming the nexus that brings him within the ambit of the debarment regulations was established by the three contracts he executed as president and CEO of AME. Thus, Respondent asserts, because the contracts were signed after Respondent engaged in the wrongful conduct, there is no nexus between Respondent's "cashing the check" and the HANO contracts with AME. Respondent clearly misapprehends the issue here. The nexus that brings Respondent within the jurisdiction of the debarment regulations is not only the three contracts included as Government Ex. 5. It is the fact that Respondent was president of AME, a contractor that performed services for HANO, a federally funded housing authority. The regulations provide at 2 CFR 180.150 that "[g]iven a cause that justifies an exclusion under this part, a Federal agency may exclude any person who has been, is, or may reasonably be expected to be a participant or principal in a covered transaction." In the instant matter, the cause that justifies Respondent's exclusion is his criminal conviction. *See* 2 CFR § 180.800. As previously determined, Respondent's past service with AME means that

- he has been and may reasonably be expected to be a participant or principal in a covered transaction. *See* ¶ 1, *supra*.
9. HUD has established a cause for Respondent's debarment by a preponderance of the evidence based upon Respondent's criminal conviction. *See* 2 CFR § 180.850.
  10. Pursuant to 2 CFR § 180.860, the following mitigating factors were considered in imposing an appropriate period of debarment:  
Respondent's demonstrated remorse for his improper conduct; his candid and sincere testimony at his hearing; the fact that his improper action resulted from one act of wrongdoing that was short-lived; his formerly clean record; his acceptance of responsibility for and recognition of his misconduct; his cooperation with the criminal investigation; his payment in full of all fines assessed by the court in his criminal matter; the fact that his misconduct was not motivated by cupidity or pecuniary gain but by a mistaken sense of loyalty; the fact that his misconduct occurred well over five years ago; and, the commendatory letters submitted on his behalf. As an aggravating factor, I have considered Respondent's role in carrying out the wrongdoing.
  11. Respondent's actions described here raise grave doubts with respect to his business integrity and personal honesty.
  12. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
  13. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honesty and integrity.

#### DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR §§ 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent for a period of 18 months from the date of this Determination. Respondent's debarment is effective for covered transactions from the date of this Determination. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: 7-9-2010

  
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Craig Clommensen  
Debarring Official




**CONCURRENCE:**

In the Matter of:

BURNELL MOLIERE – DOCKET NO. 10-3628-DB

Dated: July 5, 2010

  
Mortimer F. Coward  
Debarring Official's Designee